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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

MICROSOFT CORP.

and

ACTIVISION BLIZZARD, INC.,

Defendants.

Case No. 3:23-cv-2880

**PLAINTIFF FEDERAL TRADE
COMMISSION'S BENCH BRIEF
REGARDING DEFENDANTS'
PROFFERED TESTIMONY
REGARDING MICROSOFT'S
AGREEMENTS**

PLAINTIFF'S BENCH BRIEF REGARDING DEFENDANTS' PROFFERED TESTIMONY REGARDING
MICROSOFT'S AGREEMENTS
CASE NO. 3:23-CV-2880

1 Defendants intend to offer fact and expert witness testimony that certain Microsoft
 2 agreements will benefit consumers even though Defendants claimed privilege over evidence of
 3 the bases for those witnesses' opinions. The FTC is not requesting a finding of waiver or to
 4 pierce the privilege, which may indeed have been properly asserted. Fairness, however, requires
 5 precluding Defendants from eliciting testimony now that elaborates on topics over which they
 6 previously claimed privilege.

7 Shortly before the Federal Trade Commission (the "FTC") brought its administrative
 8 challenge to Microsoft's proposed acquisition of Activision, Microsoft hastily sought
 9 agreements with some of its competitors as part of an eleventh-hour attempt to assuage the
 10 concerns of regulators. Microsoft signed side deals with Nintendo, Nvidia, and foreign cloud
 11 providers and proposed an agreement to Sony (collectively, the "Agreements"). Although the
 12 Agreements' terms and conditions differ, they all purport to bring Activision content to rivals'
 13 platforms contingent on the consummation of the Proposed Acquisition. Defendants intend to
 14 make the Agreements central to their defense. *See, e.g.*, Defs.' Conclusions of Law at ¶ 76
 15 ("The FTC must account for the 'economic reality' of these existing contracts as part of its
 16 burden..."); Defs.' Findings of Fact at ¶ 137 ("Post-transaction (and post-porting),
 17 approximately 100 million gamers would be able to play Call of Duty on their existing
 18 Nintendo devices for the first time in many years."); Defs.' Mem. Of Law in Opp. to Mot. for
 19 Prelim. Inj. (ECF 108) at 22 ("FTC does not even try to make that showing, nor could it—
 20 particularly in light of the binding contracts Microsoft has already struck with Nvidia and other
 21 cloud providers.").

22 The Agreements, however, are filled with loopholes¹ and speculative commitments.²

24 ¹ Paragraph 7.4 of the Nvidia agreement, "Unanticipated and Unforeseeable Future Events,"
 25 allows Microsoft to renegotiate its agreement with Nvidia if Microsoft *unilaterally* decides
 26 that existing terms would be "impracticable, unduly onerous, or uneconomic."

27 [REDACTED]

(Continued...)

There are fundamental misunderstandings between the counterparties.³ Accordingly, the FTC sought discovery into these Agreements and deposed Microsoft executives regarding the business rationale, financial analyses, technical analyses, terms and conditions, and any internal concerns. The FTC sought this testimony to test the basis of Defendants' employees' claims regarding the supposed real-world benefits of the Agreements. Uniformly, Microsoft asserted privilege over the underlying business premises of how they reached the terms of these Agreements:

Matt Booty Deposition:

Q. And have you analyzed the technical issues with bringing the Call of Duty game to Nintendo Switch?

Microsoft Counsel. To the extent if you can answer this question or—can you answer the question without disclosing conversations you had with lawyers or work you've done at the direction of lawyers?

A. I cannot, it was all very directed by the lawyers.⁴

Sarah Bond Deposition:

Q. Did you give the people who were negotiating with Nintendo your opinion as to the terms that should be negotiated for their impact on Microsoft's gaming business?

Microsoft Counsel. Objection. That calls for privilege and I'll instruct not to answer.

Q. Are you going to take your attorney's advice?

[REDACTED]

⁴ PX7048 (Matt Booty) Dep. at 174:4-19.

1 A. I am.

2 Plaintiff Counsel. Counsel, can I pause here and just ask for the
3 specific basis of that instruction not to answer, because I'm asking
4 for her input as to the business terms and their impact on Microsoft's
5 gaming business that she gave this witness, Ms. Bond.

6 Microsoft Counsel. That's not how they have these discussions.
7 They have these discussions with [Microsoft in-house counsel
8 Linda] Norman and they discuss the legal ramifications for legal
9 issues, the business aren't separate from the legal terms. And we
10 reviewed this conversation and it is a privileged conversation. I
11 understand what you're trying to get at as if it was some separate
12 input, but it's not, is it a—was a conversation among the three of
13 them, which included advice and legal discussions.⁵

14 **Tim Stuart Deposition:**

15 Q. Have you or your team done any analysis of the financial
16 implications for Microsoft of executing [the Nvidia Agreement's
17 Windows provision]?

18 Microsoft Counsel. And I'll instruct you that you can answer to the
19 extent you're not answering about any analysis you conducted
20 pursuant to a lawyer's request.

21 A. Nothing outside of lawyer's request.⁶

22 Defense counsel has asserted that no analyses were withheld from the FTC and have cited
23 witness testimony to this effect. Exhibit A (FW: Meet and Confer Email). As the above passages
24 show, however, Defendants omit a critical detail: Microsoft witnesses claimed to be unaware of
25 *non-privileged* analyses.

26 Attorney-client privilege “may not be used both as a sword and a shield.” *Chevron Corp.*
27 *v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (quoting *United States v. Bilzerian*, 926
28 F.2d 1285, 1295 (2d Cir. 1991). Here, the FTC expects that Microsoft executives will continue to

⁵ PX7044 (Sarah Bond) Dep. at 104:5-105:13.

⁶ PX7040 (Tim Stuart) Dep. at 382:12-21.

1 testify about the Agreements’ purported benefits despite having wielded the privilege as a shield
2 to withhold information relevant to testing those purported benefits.

3 Defendants are incorrect that the FTC has been dilatory because it did not move to
4 challenge the privilege claims and compel testimony. Defendants protected this evidence from
5 discovery on grounds of attorney-client privilege, which the FTC assumed was made in good
6 faith and had no reason to contest at the time. *See Vital Pharmaceuticals v PHD Marketing, Inc.*,
7 2022 WL 2284544 at *3 (C.D. Cal. April 15, 2022) (“Defendants’ repeated assertion of the
8 attorney-client privilege over communications concerning this lawsuit...made it reasonable for
9 Plaintiffs to avoid inquiring further into these discussions.”). The FTC had no basis to compel
10 protected attorney-client information, but the FTC is entitled to prevent Defendants from
11 selectively waiving that privilege to (1) elicit testimony as to the beneficial effects of the
12 Agreements and/or (2) allow Dr. Carlton, one of their experts, to base his opinions regarding the
13 procompetitive effects of witnesses whose foundation is locked behind privilege.

14 The same privilege issues taint Microsoft’s arguments related to the purported benefits of
15 its international remedies. As counsel for Microsoft explained at the June 21 conference with the
16 Court,⁷ Defendants claimed privilege over information related to remedies Microsoft offered to
17 the European Commission. Yet, Microsoft’s Pre-Trial Findings of Fact prominently feature these
18 remedies as evidence against the alleged anticompetitive harms.

19 In any event, neither the Agreements nor the international remedies have a place in this
20 proceeding. The narrow purpose of a §13(b) proceeding does not extend even to the initial
21 question of liability, *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984), let
22 alone to the subsequent question of what remedy might be appropriate if the administrative
23 proceeding ultimately yields a finding of liability. *See FTC v. Food Town Stores, Inc.*, 539 F.2d
24 1339, 1345 (4th Cir. 1976) (holding FTC was “entitled to preserve the status quo pending
25

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27 ⁷ Case Management Conference, *FTC v. Microsoft*, 3:23-CV-2880 (N.D. Cal. June 21, 2023)

adjudication” regardless of what “ultimate remedy” might eventually be deemed appropriate).

Respectfully submitted,

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